TREATIES.[1]

A treaty occupies very much the same place in international law that a contract does in municipal law. Although there is a strong analogy between the two, it is not to be pushed too far, and, like all analogies, must be handled with caution. The principal distinction lies in the circumstance that a contract is enforced by the political power of the state, whereas, there is no political power external to the independent states of the world to enforce treaties between them. Persons, therefore, accustomed to the binding force of contracts frequently are unable to understand why a treaty is not as binding, and are startled at the spectacle of an independent state disregarding its treaty obligations. A true view of international relations will disclose that such breaches are to be expected, and however blameworthy on the ground of morality or ethics, may be explained as a temporary change in the ordinary equipoise of the external factors influencing independent state conduct.

The Great War, now raging in Europe, has not, as has been thought by persons unfamiliar with the subject, destroyed international law. A law as it exists even in municipal life is none the less a law because it is sometimes violated. If A murders B, the law against murder still remains, and even if a riot occurs in which a number of persons lose their lives, the law is still not destroyed.

The purpose of this article is to attempt a brief outline of the international law of treaties and assist the reader in forming an intelligent opinion on a subject of much interest at the present time.

The subject will be discussed under the headings of: (A) Definition and Form, (B) Classification, (C) Parties, (D) Formation, (E) Obligation, (F) Excuse for Non-performance, (G) Effect of War, (H) Effect of Birth, Extinction and Merger of States, (I) Interpretation, (J) Effect on Independence, (K) Law-making Effect.[2]

---

[1]All rights reserved. This article forms part, in a condensed form, of a treatise on International Law now in course of preparation. If, therefore, it has the aspect, so to speak, of hanging in the air, the reader will know what the reason is.

[2]Hall, Int. Law, 6 ed., (1909) p. 317, says treaties may be considered with reference to: (1) the antecedent conditions upon which their validity depends, (2) their forms, (3) their interpretation, (4) their effects, (5) certain means of assuring their execution, (6) the conditions under which they cease to be obligatory, (7) their renewal.

DEFINITION AND FORM.

A treaty may be defined as an agreement between two or more states to do or not to do a particular thing. It must therefore be entered into by states, and an agreement between them is essential. A number of definitions have been collected in the note, most of which, it will be observed, attempt too much, and, as a result, limit the definition.[3]

Although the opinion has been advanced that a treaty must be in writing,[4] it seems to have no foundation in reason. The transaction is too important to be left to the fleeting memory of the negotiators, and the universal practice is to reduce the treaty to documentary form.

Treaties were universally in the Latin language until the middle of the seventeenth century, after which French was employed.

---

[3]Some of the definitions of a treaty which have been offered are as follows:

"International Treaties or Conventions are agreements or contracts between two or more States, usually negotiated for the purpose of creating, modifying, or extinguishing correlative rights and reciprocal obligations." Hershey, Int. L., (1912) p. 311.

"Treaties, allowed under the law of nations, are unconstrained acts of independent powers, placing them under an obligation to do something which is not wrong," Woolsey, Int. L., 5 ed. (1878) p. 166.

"A treaty, or, to employ ancient terminology, a public treaty, is a convention agreed upon between two or more political communities." Ernest Nys, American J. Int. L., Vol. 6, p. 282.

"A treaty * * * is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time." Vattel, Chitty's Trans. (1861) Book II § 152.

"International treaties are conventions or contracts between two or more States concerning various matters of interest." 1 Oppenheim, Int. L., 2 ed. (1912) p. 540.

"Treaties * * * are the written portions of that Law which binds together the Society of States, and they occupy a place in that system, which, in some degree, corresponds to the place occupied by statutes in the system of the Municipal and Public Law of Independent States." 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 69.

"*Treaties,* properly so called, or *foedera,* are those of friendship and alliance, commerce, and navigation, which, even if perpetual in terms, expire of course:—(1) In case either of the contracting parties loses its existence as an independent State. (2) Where the internal constitution of government of either State is so changed, as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded. * * * (3) In case of war between the contracting parties; unless such stipulations as are made expressly with a view to a rupture," Wheaton, Elements, Dana's ed. (1866) pp. 351, 352.

"Express covenants made between nation and nation are called public covenants or treaties. The covenants which the sovereign makes as a private person, or those which he makes as a sovereign, but with private persons (as private persons) do not take the name of treaties." Martens, Int. L., Cobbett's Trans. (1795) Book II. Ch. 1, § 2.

[4]2 Phillimore, Int. L., 3 ed. (1879-1888) 78; Martens, Int. L., Cobbett's Trans. (1795) Book II, Ch. 2, § 3.

The usage now is for states having different languages to have treaties drawn up in the language of each in parallel columns.

The choice of words and arrangement of parts is entirely in the discretion of the parties, although, as may be expected, the force of custom and precedent imposes on treaties a certain formal aspect and arrangement.[5]

Treaties have been designated by various names, as follows: Acts,[6] Armistices,[7] Cartels,[8] Capitulations,[9] Concordats,[10] Conventions,[11] Declarations,[12] *Modus Vivendi*,[13] *Pactum de Contra-*

[5]1 Oppenheim, Int. L., 2 ed. (1912) 552.

[6]The term "act" was applied to the various paragraphs of the provisions of the treaty of Vienna, and has been applied in a similar provision in other general treaties. The term, however, seems to be of little application and had best be discarded.

[7]An armistice differs from a truce in that in an armistice there is not only a cessation of hostilities but an agreement between the parties as to certain points. It is more in the nature of a local treaty between the commanders of the opposing forces entered into for the purpose of suspending hostilities.

[8]"Cartels are a form of convention made in view of war or during its existence in order to regulate the mode in which such direct intercourse as may be permitted between the belligerent nations shall take place, or the degree and manner in which derogations from the extreme rights of hostility shall be carried out." Hall Int. Law 6 ed. (1909) pp. 545-546.

[9]"A capitulation is an agreement under which a body of troops or a naval force surrenders upon conditions. The arrangement is a bargain made in the common interest of the contracting parties, of which one avoids the useless loss which is incurred in a hopeless struggle, while the other, besides also avoiding loss, is spared all further sacrifice of time and trouble and is enabled to use his troops for other purposes." Hall Int. Law 6 ed. (1909) p. 547.

[10]A concordat is an agreement between the Pope and an independent state concerning the affairs of the Church in such independent state. These are now only entered into by Catholic States. See 1 Halleck, Int. L., 4 ed. (1908) p. 302 *n*. For further discussion of Concordats, see 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 427.

[11]Conventions. The term convention is indiscriminately applied to treaties but perhaps more usually to the various subdivisions of the general rules adopted at international congresses. Thus, the important rules adopted at the First and Second Peace Conferences at the Hague are called "conventions"; so also the result of the deliberations at the Red Cross Congress at Geneva. "Treaties and conventions are practically synonymous, although the latter term is probably applied more frequently to treaties of lower importance." Hershey, Int. L., (1912) p. 311 *n*.

[12]A declaration, properly speaking, is a unilateral act setting forth the intention or resolution of the party signing it, and has no binding validity unless accepted or adopted by some other party, and does not from its form necessarily contemplate such adoption as in the case of a contract. The results of several important conferences of international delegations have been designated as declarations, for example, the Declaration of St. Petersburg, in 1856; Declaration of London, in 1909. The contents of such declarations are not to be distinguished on principle from those containing the convention laid down at the Hague, and there really seems to be no reason why the word "declaration" should be used any longer, though its meaning as to these particular historical events has become fixed.

[13]*Modus Vivendi* are agreements to carry on an existing state of affairs pending a final determination.

hendo,[14] Preliminary Treaties,[15] Protocols,[16] *Punctationes,*[17] *Sponsions,*[18] Truces.[19]

Most of these names have a technical significance and are explained in the notes. In a few cases there is an obscurity, but in most cases the meaning is sufficiently clear.[20]

---

[14]*Pactum de contrahendo* "is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties." 1 Oppenheim, Int. L., 2 ed. (1912) p. 547.

[15]"Preliminaries of peace are an agreement intended to put an end to hostilities at an earlier moment than that at which the terms of a definitive treaty can be settled. They contain the stipulations which are essential to the re-establishment of peace, together sometimes with arrangements having a temporary object; minor points which lie open to discussion or bargain, and details for the settlement of which time is required, being held over for more leisurely treatment. Preliminaries thus constitute a treaty which is binding in every respect so far as it goes, but which is intended to be superseded by a fuller arrangement, and is so superseded when the definitive treaty is signed. For an example of preliminaries and of a definitive treaty of peace, see the Preliminaries of Versailles and the definitive Treaty of Frankfurt in D'Angeberg, Nos. 1119 and 1179." Hall Int. Law 6 ed. (1909) p. 555, n. 1.

"A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later. Such preliminary treaty is a real treaty and therefore binding upon the parties." 1 Oppenheim, Int. L., 2 ed. (1912) pp. 546, 547.

[16]"Protocols" are preliminary agreements entered into before the signing of the treaty itself. "During the negotiations for a treaty the discussion of each sitting and the resolutions arrived at are set down in a document called a Protocol." Hall Int. Law 6 ed. (1909) p. 321, n. 3.

[17]*Punctationes* are "mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty." 1 Oppenheim, Int. L., 2 ed. (1912) p. 546.

[18]*Sponsions.* "Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions.*" Wheaton, Elements, Dana's ed. (1866) p. 329.

"By the Latin term *sponsio* we express an agreement relating to affairs of state, made by a public person who exceeds the bounds of his commission, and acts without the orders or command of the sovereign." Vattel, Chitty's Trans. (1861) Book II § 208.

[19]Truce. A truce is a cessation of hostilities between opposing military forces which may be only temporary or may continue until the termination of the war. It is generally of a local character confined to commanders of small bodies of troops, although it may be entered into by the commander-in-chief of the entire army.

[20]Hall Int. Law, 6 ed. (1909) p. 317, *n.* 1, says:

"Contracts entered into between states and private individuals, or by the organs of states in their individual capacity, are of course not subjects of international law. Of this kind are—(1) Concordats, because the Pope signs them not as a secular prince, but as head of the Catholic Church. (2) Treaties, of which the object is to seat a dynasty or a prince upon a throne, or to guarantee its possession, in so far as the agreement is directed to the imposition of the dynasty or prince upon the state for reasons other than strictly international interests, or to their protection against internal revolution, because such contracts are in the interest of the individuals in their personal capacity, and not in their capacity as representatives of the will of the state. (3) Agreements with private individuals, e. g. for a loan. (4) Arrangements between different branches of reigning houses,

CLASSIFICATION.

The writers on international law have classified treaties under some one or more of the following terms: Alliance,[21] Amity and Friendship,[22] Arbitration, Association,[23] Boundary,[24] Cession,[24] Confederation,[25] Commerce,[26] Dispositive,[31] Equal and unequal,[27] General, Guarantee,[28] Law Making, Peace,[29] Private, Public,

or between the reigning families of different states, with reference to questions of succession and like matters."

Roman civilians divided all international contracts into three classes: *Pactiones, Sponsiones* and *Foedera.* Wheaton, Elements, Dana's ed. (1866) p. 329, n. a.

"The compacts which have temporary matters for their object are called agreements, conventions, and pactions". Vattel, Chitty's Trans. (1861) Book II § 153.

[21]"Treaties of alliance are, on the contrary, usually entered into for the purpose of common security and general defence, but without reference to any particular power or to any special event." 1 Halleck, Int. L., 4 ed. (1908) pp. 305, 306; see, Wheaton, Elements, Dana's ed. (1866) pp. 355, 364. They have also been divided into real and personal alliance, equal and unequal, general and special, defensive and offensive.

[22]Ancient name for treaties providing simply for mutual intercourse and friendship. 1 Halleck, Int. L., 4 ed. (1908) p. 306.

[23]"Treaties of association are usually made for the purpose of war, two or more states associating themselves together for the purpose of carrying on joint operations against a common enemy." 1 Halleck, Int. L., 4 ed. (1908), p. 305.

[24]Boundary and cession treaties are those providing for a boundary between two or more states or calling for a cession of state territory. Discussed in Halleck, Int. L., 4 ed. (1908) pp. 306, 307.

[25]Treaties of confederation are usually made for the purpose of forming a union more or less close in reference to certain special objects with respect to internal or external matters." 1 Halleck, Int. L., 4 ed. (1908) p. 305.

[26]Treaties of commerce are those which regulate the conditions of reciprocal trade, and define and secure the imperfect rights and duties of commercial intercourse. 1 Halleck, Int. L., 4 ed. (1908) p. 307.

[27]Equal and unequal. "Equal treaties are where the contracting parties promise the same or equivalent things; and unequal treaties are where the things promised are neither the same nor equitably proportioned". 1 Halleck, Int. L., 4 ed. (1908) p. 304; see Vattel, Chitty's Trans. (1861) Book II § 172. Sometimes spoken of as bilateral or unilateral. To be distinguished from equal and unequal alliances, which distinction relates to the dignity or rank of the states concerned. 1 Halleck, Int. L., 4 ed. (1908) p. 304.

[28]Guarantee * * * "is an engagement by which one State promises to aid another where it is interrupted, or threatened to be disturbed, in the peaceable enjoyment of its rights, by a third power." Wheaton, Elements, Dana's ed. (1866) p. 354. "Treaties of guarantee are agreements through which powers engage, either by an independent treaty to maintain a given state of things, or by a treaty or provisions accessory to a treaty, to secure the stipulations of the latter from infraction by the use of such means as may be specified or required against a country acting adversely to such stipulations." Hall Int. Law 6 ed. (1909) p. 334.

Cases of treaties of guarantee: (a) Treaty of Tilsit, by which Germany and Russia guaranteed to each other the integrity of their respective possessions. Hall Int. Law 6 ed. (1909) p. 334; Woolsey, Int. L., 5 ed (1878) p. 174. (b) Treaty of April 13, 1856, by which Great Britain, Austria and

Recognition,[30] Special, Subsidy, Succor, Transitory.[31]

Most of these terms are self-explanatory, some have been further discussed in the notes. They relate to the diplomatic or the political aspects of the treaty, which questions lie entirely outside the discussion, although the writers frequently refer to them at length.[32]

France guaranteed "jointly and severally the independence and integrity of the Ottoman Empire, recorded in the treaty concluded at Paris on the 30th of March". (Hall, *op. cit.* 335) (c) Treaty of 1831 and 1839, by which Belgium was constituted an independent and neutral state, the several states guaranteeing the neutrality. (d) 1855, Treaty by which Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory of the crowns of Sweden and Norway, nor to concede any right of pasturage or fishery or other rights of any nature whatsoever in consideration of a guarantee by Great Britain and France of the Swedish and Norwegian territory. (Hall, *op. cit.* 335.) See also 1 Halleck, Int. L., 4 ed. (1908) pp. 304, 312, 313. 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 84 *et seq.*; Woolsey, Int. L., 5 ed. (1878) p. 174.

[29]"When the belligerent powers have agreed to lay down their arms, the agreement of contract in which they stipulate the conditions of peace, and regulate the manner in which it is to be restored, is called the *treaty of peace.*" Vattel, Chitty's Trans. (1861) Book IV § 9.

[30]Treaties of recognition have for their object the admission of a new member of the family of nations or the recognition of a new title. 1 Halleck, Int. L., 4 ed. (1908) p. 306.

[31]A transitory or dispositive treaty is one "which disposes of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting a right of way over it disposes of or about the field by transferring the property in it to the purchaser or creating a right of way over it in the grantee". 1 Westlake, Int. L., 2 ed. (1910) pp. 60, 61. Such are treaties of cession. Continuing, the same author says that they are so called because this effect passes over into and forms part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact without being always obliged to refer to the dealings which created it. He admits the term is bad because the word "transitory" does not suggest permanency, yet the operation of the treaty is usually most permanent, and the best word is dispositive. In plain English, what all this means is that some treaties call for immediate performance, and when that is done, the treaty is executed—*functus officio*—and we have only to deal with an altered state of facts resulting from the performance. In the simple language of the municipal law, the treaty is fully executed. See also, Westlake, Int. L., 2 ed. (1910) p. 294.

[32]Pradier Fodere, II. Nos. 920, *et seq.* (quoted in Hershey, 311, *n.* 2), divides treaties as follows: General treaties; Treaties of peace, Political union, Alliance, Guarantee and protection, Neutrality, Cession, Commerce, Unions and Customs. Special treaties: Concordats, Boundary treaties, Treaties establishing servitudes, Treaties of navigation, Consular conventions and capitulations, Conventions relating to literary and artistic property, industrial property, extradition treaties, postal, and telegraphic conventions, and conventions relating to railroads. Hershey (*op. cit.* 311, *n.* 2) divides treaties into executed or executory, transitory or continuing, dispositive or permanent; and, on p. 312, into simple or conditional, unilateral or bilateral, preliminary or definitive, accessory or additional, subsidiary or principal. Oppenheim, Int. L., 2 ed. (1912) Vol. 1, p. 541, divides treaties into law-making and treaties concluded for all kinds of other purposes. See Hall, *op. cit.* 353, *n.* 1, for review of the classifications of some

A distinction has been drawn between treaties real, which bind the contracting parties (i. e. the states), independently of any change in the rulers, and treaties personal, which are such as are made with a view to the person of the ruler and only bind the state during his continuance in office.[33]

The constitution of a federal government, like that of the United States of America or of Switzerland, is formed by the union of several states. Sometimes these states were formerly independent, sometimes they simply passed from one state of dependence to the new state of dependence in the federal union. The compact between them is called a constitution and is an agreement between several states. It is to be distinguished from a treaty in that it sets up a new state and prescribes the form of government thereof; that is, it constitutes a state government, whereas, a treaty simply contemplates action of the parties to it as parties without setting up any superior political power. In the case of a constitution, the government is the result of the execution of the treaty between the states, and the preliminary agreement drops

of the authors. Phillimore, Int. L., 3 ed. (1879-1888) Vol. 2 p. 70, considers treaties:

(1) As to the subject, whether they relate to a matter of natural right or whether they contain some obligation as to what was previously indifferent.

(2) With respect to their object.

(3) With respect to the contracting parties, whether they are:
- (a) Both Christian
- (b) Christian and infidel
- (c) Christian and Mohammedan
- (d) Within or without Europe

(4) With respect to the time in which contracted.
- (a) Whether before or after the Treaty of Westphalia (1648)
- (b) Whether before or after the Treaty of Utrecht (1713)
- (c) Whether before or after the period of the Treaty of Utrecht to the outbreak of the French Revolution (1791)
- (d) Whether during twenty-five years of the Napoleonic wars
- (e) Whether between that period and the present (1882).

(5) Certain international engagements, as contracts between the State and a private individual of another country, and contracts relating to the private affairs of the sovereign are not treaties.

(6) Treaties also to be considered with respect to their action and object.

"General compact between nations may be divided into what are called *transitory conventions,* and *treaties* properly so termed." Wheaton, Elements, Dana's ed. (1866) p. 340. The first are perpetual in their nature, so that once being carried into effect, they subsist, independent of any change in the government, and although their operation is suspended during war, they are ratified on return of peace, *e. g.,* treaties of cession, boundary, exchange of territory.

[33]This distinction was laid down by Vattel, Vattel, Chitty's Trans. (1861) Book II § 183-197 and was adopted by Wheaton. Elements, Dana's ed. (1866) pp. 43 *et seq.,* 351, 352; 1 Halleck, Int. L., 4 ed. (1908) pp. 302, 303, but is now obsolete according to Hershey. Int. L., (1915) p. 311, *n.* 2.

out of sight and the new state as an entity is alone left in view, just as the engagement to marry is a contract which is fully executed and disappears as a result of the marriage. It ought not be necessary to mention this point, but some writers have referred to these constitutions as treaties, and it therefore seems advisable to refer to the subject.

It will be observed that the numerous classifications of treaties which have been adopted by the various authors confuse two important classifications which are independent of each other, and should therefore be separately discussed. The one is the classification of treaties with respect to the performance; that is, whether fully performed or not performed. The other, the classification with respect to the objects contemplated by the treaty. The latter classification can never be exhaustive as the changing aspect of international affairs will continually present new objects of international agreements. Since states are parties to treaties and state conduct only is involved in the international world, every treaty will relate to state conduct and these treaties may be classified with respect to the particular objects, as follows:

(1) Those relating to state territory, as treaties of boundary and cession, and neutralization of particular places. (2) Those relating to political conduct of states to each other and with respect to third states. (3) Those relating to the open sea. (4) Those relating to the treatment of members of one state within the jurisdiction of another. (5) Those providing for exercise of state functions by one state on the territory of another. (6) Those providing for joint administrative functions. (7) Those providing for identity of private municipal law or providing for regulation of conflicts therein. (8) Those applying to a third state. (9) Those relating to a state of war between the parties.

PARTIES TO A TREATY.

Is there any distinction to be drawn between states as to their capacity to enter into a treaty? Incapacity is physical,—as insanity,—and legal, as the case of a married woman in English common law. Such legal incapacity, however, arises only because there is a political power to enforce it, is purely artificial, and cannot exist in the world of independent states where there is no political superior. Several cases present themselves concerning: A. independent states, which are to be divided into three classes—(1) those members of the family of nations, (2) those not mem-

bers, and (3) those, in either case, where there is a paralysis of government,—B. dependent states.[34]

An independent state, a member of the family of nations, with a government in full force, no matter what its form, undoubtedly has full capacity to make a treaty. No suggestion to the contrary has ever been made. If the government of an independent state is paralyzed or has disappeared by reason of anarchy or other internal cause, there is no political organization to represent the community of the people in international life, and consequently no state which can enter into a treaty. Such cases are not of frequent occurrence, and when they do occur are of short duration, and therefore such incapacity has no very serious effect upon the international life of states.[35]

Down to the beginning of the nineteenth century, when the princes of Europe were the only recognized members of the family of nations, the notion was strongly entertained that a distinction was to be drawn as to treaties made with powers outside the membership. Prior to the successful culmination of the Reformation, treaties with non-Christian states were also distinguished. The distinction in each of these two cases did not actually go to the length of maintaining that no treaty should be made, but only to the application of the principle that such treaties were not binding. The Christian princes of Europe did not hesitate to enter into treaties with the formidable Ottoman Porte whenever induced by force or self-interest, and made light of evading them whenever it was possible and advantageous. The idea of religious exclusiveness has long since disappeared and is now a matter only of historical interest. The snobbishness of kings, however, still cultivated the idea of the inferiority of states not members of the family of nations, and treaty obligations with such were regarded very much as the fashionable fop considers his tailor bill.

Traces of this notion are still to be found in the writers. The practice of the international world has fully dissipated any idea that such treaties are unequal or of less obligation than others. The circle of the family of nations, furthermore, has so widened that

[34]The notion, which was formerly urged, that a state could not enter into a treaty with another state professing a different religion, is now obviously merely of historic interest. 1 Halleck, Int. L., 4 ed. (1908) p. 294 n; 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 74; Vattel, Chitty's Trans. (1861) Book II § 162.

[35]Thus the present state of anarchy in Russia seems to present a case where there is no government which can be definitely pointed out as representing the community. The same thing occurred for a while during the French Revolution.

to-day it includes all independent states of the world of any importance and treaties are freely made with a few independent ones still outside the charmed circle.

In the case of a dependent state, the only question is whether the political tie between it and the independent state on which it is dependent eliminates it from international life to such an extent as to inhibit the treaty-making functions.[36]

This, therefore, is solely a question of municipal law to be determined by an examination of the constitution of the state.[37]

In the case of a revolted or insurgent state, where the parent state has not recognized its independence, and there is some doubt as to whether it will ever become a state, a question will arise as to its capacity to make a treaty. Although serious difficulties may arise through this state of facts in connection with the questions of recognition, sending of diplomatic envoys and observance of neutrality, the question as to a treaty will not often arise until it has established its independence, and while other states may recognize the independence or the belligerency of such a body, such recognition is not necessarily followed by the conclusion of a treaty.

The making of a treaty with such a body is solely a question of discretion with the independent state concerned, and the parent state is the only party which can complain.[38]

Some writers speak of a right to make a treaty, in which they are probably using the word "right" in the sense of power. Since

[36] "All contracts therefore are void which are entered into by such states in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior states." Hall Int. Law 6 ed. (1909) p. 318.

[37] 1 Halleck, Int. L. 4 ed. (1908) pp. 289, 294.

Member states of Switzerland may conclude non-political treaties among themselves and treaties with foreign states concerning matters of police, local, traffic and state economics.

Member states of German Empire may by Article II. of the Constitution of the German Empire conclude treaties as to all matters not confided to the Empire by Article IV. 1 Oppenheim, 544, *n.* 1.

Member states of the United States, by the Constitution of the United States, Art. I. Sec. 10, (1) are prohibited from entering "into any treaty, alliance or confederation, and by Art. 1, Sec. 10, (2) "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into an agreement or compact with another state or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay."

On March 17, 1897, the then South African Republic entered into a treaty of alliance with the Orange Free State, although the former state was said by Great Britain to be a semi-sovereign state under British sovereignty. 1 Halleck, Int. L., 4 ed. (1908) p. 295, *n.* 1.

[38] In 1778, France, and in 1782, the United Netherlands, respectively, made treaties with the revolted American colonies.

an independent state has no political superior, the word "right" in a technical sense of the municipal law cannot be applied to any state act.[39] In what other sense it can be used in this connection does not clearly appear.

A dependent state having no part in international life, and therefore subject to municipal law, has no right to make a treaty in the correct sense of the word, because it is restrained by the superior political power of the independent state upon which it is dependent.

FORMATION.

The treaty-making function is exercised by the organs of the state having that power, by negotiation, by which the terms of the proposed treaty are discussed and agreed upon, and then by the actual execution of the document itself. The organ or organs of states, charged with the duty of exercising the function, and their powers, are prescribed by the municipal law.[40] Formerly, the power was a personal prerogative of the prince. In democracies and limited monarchies the representatives of the people as determined by the municipal constitution, participate in the exercise of the function.[41] Where, as in most cases, several different branches of the government have a hand in the matter, a certain amount of delay and difficulty will sometimes inevitably occur.

The primary function of forming the treaty is usually vested in the chief executive or head of the state, who generally conducts negotiations through officers of state or envoys, and then submits the treaty as agreed upon to the organ of the state having power of

[39] "The so-called right of making treaties is not a right of a State in the technical meaning of the term, but a mere competence attaching to sovereignty." 1 Oppenheim, Int. L., 2 ed. (1912) p. 543.

[40] "It is from the fundamental laws of each state that we must learn where resides the authority that is capable of contracting with validity in the name of the state." Vattel, Chitty's Trans. (1861) Book II § 154.

[41] United States of America.—The power is exercised by the President by and with the consent of the Senate. "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." Art. II. § 2, (2) Constitution of the United States. 5 Moore, Dig. of Int. L. (1906) pp. 156-221.

France.—By Art. 8 of the Constitution, "the President exercises the treaty-making power, but peace treaties and such other treaties as concern commerce, finance, and some other matters, are not valid without the co-operation of the French Parliament." 1 Oppenheim, Int. L., 2 ed. (1912) p. 546.

Germany.—By Articles 1, 4, and 11 of the Constitution, the emperor exercises the treaty-making power; but such treaties as concern the frontier, commerce, and several other matters, are not valid without the assent of the Bundesrath and Reichstag. 1 Oppenheim, Int. L., 2 ed. (1912) p. 546.

ratification. We have therefore to consider negotiation and ratification.

The terms of the treaty are arrived at by negotiation between the states concerned, which negotiations may be carried on by the head of the state directly, by other officers of the state appointed by law, or by diplomatic agents appointed for the purpose. Direct negotiation by the head of the state is usually impossible and rarely occurs in practice. The usual custom is to empower negotiators. The Secretary of State or Foreign Minister usually supervises the action of the negotiators and acts as an intermediary between the government and the diplomatic agents.

The agents for negotiation have the powers conferred by the state sending them, generally expressed in a written document. When the agents meet, the powers are exhibited, and sometimes a representative will refuse to go on with the negotiations if the powers conferred on the other party are not satisfactory.[42]

It is obvious that the negotiation must result in an agreement between the parties, otherwise there can be no treaty in fact, and that the terms of the treaty consist of what was agreed upon by the negotiators. The treaty, therefore, is a written document so drawn up. The fact of agreement has caused great difficulty in international law. When two individuals stand face to face, the fact of agreement will be evidenced by writing signed, word, or otherwise. Even in the municipal law cases arise where there is a dispute over whether there was an agreement in fact. Now, when we turn our attention to international life, we find that the cumbersome immensity, compared with individuals, of the bodies with which we are dealing, has given rise to some difficulties of practice. The cases conveniently fall into the headings of absolute monarchs and constitutional states, either monarchical or republican. This is one of the cases where the form of state is material in international law, and another illustration of the change in international relations caused by the advent of democracy.

An absolute monarch was the state in theory and in fact, and his personal assent was all that was necessary to the completion

[42]In the United States the negotiation is generally conducted by the Secretary of State. Indian treaties were negotiated by special commissioners acting for the President under the War Department until control of Indian affairs was transferred to the Department of State. These treaties were filed with the Department of State. No Indian treaties have been made since the Act of March 3, 1871, which forbade further recognition of Indian tribes or nations as independent powers. Postal Conventions, since the Act of June 8, 1872, are negotiated and made by the Postmaster General. As to negotiations by the United States see, 5 Moore, Dig. of Int. L. (1906) pp. 179-184.

of a treaty. In the rare cases where monarchs dealt with each other in person, the case would in fact be just like that of two individuals making a contract in municipal life.[43]

In most cases the negotiations were carried on by agents or envoys who would act on behalf of their royal master in settling upon the terms of the treaty. Such proceedings were regarded as of the greatest moment, and were hedged around with an amount of etiquette which to our eyes seems ridiculous.

The practice was for the negotiators to draw up the treaty as agreed upon in their names as envoys, and to sign it as such. The treaty so executed was incomplete on its face until approved by their royal masters. This approval was called a ratification.[44]

The necessity of a ratification as such arose from the form in which the document was cast. Had the treaty been expressed to be between the monarchs alone, then they would have executed the writing, and, by so doing, have ratified that which their agents had done, but not the treaty, which would have come into existence as a document only when so executed. The distance which generally separated the parties and consequent delays probably dictated the former practice which has continued to the present time.[45]

[43]1676. Charles II. personally transcribed, signed, and sealed with his own hand a secret treaty with Louis XIV. 3 Hill, History of Diplomacy 143. The Treaty of Cambrai (1529) between Francis I. of France and the Emperor Charles V., was called *"Paix des Dames"* from the circumstance that it was negotiated by Margaret of Austria, sister of Charles and Louise of Savoy, mother of Francis.

[44]Ratification seems to have been usual in practice. "One of the earliest recorded examples of this practice was in the treaty of peace concluded, in 561, by the Roman Emperor Justinian with Cosroes I., King of Persia. Both the preliminaries and the definitive treaty, signed by the respective plenipotentiaries, were subsequently ratified by the two monarchs, and the ratifications formally exchanged. Barbeyrac, Histoire des Anciens Traités, Partie II. p. 295." Wheaton, Elements, Dana's ed. (1866) p. 333. *n.* b.

The Convention of July 15, 1840, between Austria, Great Britain, Russia, Prussia and Turkey, relating to the Ottoman Empire, provided that the preliminary engagements should take effect immediately without waiting for exchange of ratifications. Wheaton, Elements, Dana's ed. (1866) p. 337, cites this as a case where ratification was expressly dispensed with. Hall Int. Law 6 ed. (1909) p. 325, however, says that the envoys who signed the treaty, unless acting under a previous enabling agreement, had no authority to dispense with ratification, and that the treaty was properly a provisional one, which, when carried into effect, received tacit ratification by execution of its provisions.

[45]"Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives". 1 Oppenheim, Int. L., 2 ed. (1912) p. 553. As to the form of ratification, see, Hall Int. Law, 6 ed. (1909) p. 326. Ratification may be tacit or express. *Ibid,* p. 322. To say, as Oppenheim does (Vol. 1, 554), that the institution of ratification is a necessity for international law, is to overlook the question. What the Professor probably means is that ratification is a necessary precaution to be insisted upon by the municipal law of each state in order to avoid undue haste in making treaties.

The envoys were invested with full powers to negotiate and conclude a treaty out of consideration of the importance of the business, the high position of the parties, and respect to the other monarchs with whose agents they were engaged. It was always understood, nevertheless, notwithstanding the apparent amplitude of the instructions, that their acts were subject to ratification.[46] The prince was left somewhat at the mercy of his agents who might play him false or conclude a treaty not to his liking. Notwithstanding this, the opinion was sometimes advanced that he was bound by the acts of his agents, and that he was obliged to select them at his peril, a rule which was not without its practical advantages.[47]

The idea was then advanced that where the ambassador had acted in compliance with his instructions, secret or public, the prince is bound to ratify, but where the ambassador has exceeded or violated his instructions, the prince may delay or refuse ratification.[48] Another opinion advanced was that full powers given to an agent, although absolute on their face, were subject to an understood qualification that the prince could refuse for sufficient reason to ratify the treaty agreed upon.[49]

Another notion was that the treaty is binding except where the envoy has exceeded his full patent power, and ratification is only necessary in the case where it is expressly reserved in the full powers or stipulated in the treaty itself.[50] In this state of affairs, the prince was dethroned from his absolute power to conclude a treaty, and the voice of the people appeared in government to limit his power. The rise of democracy produced a change in the practice of ratification which will next be described.[51]

---

[46]Wheaton, Elements, Dana's ed. (1866) p. 333.

[47]Grotius, Puffendorff cited in Wheaton, Elements, Dana's ed. (1866) pp. 330, 331.

For a discussion in the 17th century over the question of whether a treaty should be regarded as being in force before being ratified by the Queen of Sweden, see Grotius, by Vreeland (1917), 195-197.

[48]Bynkershoek quoted in Wheaton, Elements, Dana's ed. (1866) pp. 330, 331; Vattel, Chitty's Trans. (1861) Book II § 155.

[49]"But, before a prince can honourably refuse to ratify a compact made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons, and, in particular, to prove that his minister has deviated from his instructions." Vattel, Chitty's Trans. (1861) Book II, § 156.

[50]Kluber quoted in Wheaton, Elements, Dana's ed. (1866) p. 334.

[51]Hall, Int. Law 6 ed. (1909), pp. 323, 324, says that ratification by a state is necessary to the validity of the treaty, which ratification in strict law may always be withheld, but morally or legally cannot be arbitrarily withheld, but a state must be left to its own discretion, subject to restraints

When the power of the government is limited and the people have a voice in the government, it is absolutely out of the question for any agents appointed by an executive to bind the government or the state. The unlimited agents of the monarch are replaced by the limited agents of modern governments, the powers of which, however, are usually expressed to be exercised subject to ratification by the state sending them.[52] Many writers still continue to discuss the question of when a ratification may be refused. Necessity of ratification is now apparent, as we would say at the bar, on the face of the record.[53]

It is only necessary now to notice that if the treaty is ratified in part or with modifications, there is no agreement, and the negotiations must be renewed or, as it is cumbersomely expressed by the writers, a treaty cannot be ratified in part. This ratification may be made with reservations upon the understanding that terms shall be understood in a certain way. The time of ratification is usually fixed in the agreement of the negotiators, and each party given a certain time within which to ratify it, following which the treaty, as it is said, falls to the ground.[54]

---

imposed by its own sense of honor and risk of wanton refusal, but that the above rule of moral obligation or ratification cannot be applied to a state like the United States, where ratification is required by the municipal law. Hershey, Int. L., (1912) p. 315, says that while some maintain that a state is morally bound to ratify, he knows of none who maintains that it is legally bound.

[52]"It is now the practice to make an express reservation of the right of ratification either in the full powers given the negotiators or in the treaty itself." Hall Int. Law, 6 ed. (1909) p. 325.

[53]Agents for ratification by municipal law: United States of America—The United States Senate, see 1 Willoughby, Constitutional Law, 462, *n.* 14, and for note on United States practice, see Dana's Wheaton 338, *n.* 138; see also 5 Moore, Dig. of Int. L. (1906) pp. 184-310.

The Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain as Emperor of India. The Governor General of Turkestan has similar powers for the Emperor of Russia. 1 Oppenheim, Int. L., 2 ed. (1912) p. 558. "* * * in England the sovereign can make a treaty without consulting parliament, as of necessity, though it is customary to acquaint parliament with the fact of such negotiation having been completed, and in some cases—especially if money be needed to carry it into effect—the treaty is laid on the tables of the two Houses before it is ratified." Manning, Int. L., 2 ed. Amos (1875) p. 128; see, 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 79, *n.* s.

[54]The commercial treaty of Utrecht between Great Britain and France was never carried into effect as the British Parliament refused to pass the necessary legislation. 1 Halleck, Int. L., 4 ed. (1908) p. 299.

France refused to appropriate money to carry into effect the convention with the United States of America of 1831. 1 Halleck, Int. L., 4 ed. (1908) p. 300.

In 1841, the French Government refused in consequence of the opposition of the Chambers to ratify a treaty made for the suppression of the slave trade. Hall Int. Law, 6 ed. (1909) p. 324.

The United States Senate ratified with modifications the treaty made

A distinction has been drawn with respect to ratification, in that it has been supposed that there is no necessity for ratification unless it is expressly reserved in the case of cartels, truces, capitulations and the like, since they are concluded in the exercise of a general implied power confided to certain public agents as incidental to their official duties.[55] This distinction, it is believed, is unsound because in any such case the state may disavow the action of the agent, and no doubt in any such case the agreement made by him is submitted to some kind of examination and approval at headquarters. The fact is that such agreements are rarely interfered with, as the circumstances are so obvious, and ordinarily the officer will be in receipt of some instructions covering the matter before he makes the agreement.[56]

THE OBLIGATION OF A TREATY.

In the municipal law, a contract which conforms to requisites prescribed by that law is binding on the parties, and if one fails to perform, the other may have the assistance of the political power of the state to secure redress for the damages caused by such failure of performance. That is all there is to the binding effect of a contract. In the international world there is no political power which can afford such redress for the breach of the terms of a treaty. The question, therefore, has been greatly discussed among the writers as to the binding effect of a treaty, that is, how far there is an obligation on a state to perform a treaty.

The practice and notions concerning the obligations of a treaty have been considerably modified by the rise of democracies and the growth of limitations on the power of the monarch. The absolute

with Great Britain in 1824 with respect to the mutual right of search. 1 Halleck, Int. L., 4 ed. (1908) p. 301.

The Hay-Pauncefoote Treaty of February 5, 1900, was ratified with modifications by the United States Senate on December 20, 1900, by which the treaty fell to the ground, Great Britain refusing to accept the modifications. 1 Oppenheim, Int. L., 2 ed. (1912) p. 557. Hall Int. Law 6 ed. (1909) p. 326, *n.* 2, says that such a case is not a ratification but a new treaty. The word "ratification" is a misnomer under which refusal of ratification is disguised. The distinction is immaterial.

[55]Wheaton, Elements, Dana's ed. (1866) p. 329.

[56]Confirmation of treaties.—It has been the practice in the international world for states when entering into treaties to confirm earlier treaties. This was particularly resorted to in the days when kings were on the thrones of Europe and treaties confirmed the various territorial positions and pretensions of the reigning houses which were constantly upset by turmoil of the powers. Every prince, therefore, who had any advantage sought to have that confirmed by each succeeding treaty entered into by the other parties.

monarch was the state, and a treaty entered into by him was his personal promise, and as such was hardly worth the paper it was written upon. It was obvious that the mere word of the prince was not to be trusted, and various means were resorted to in the attempt to add to the obligation of the treaty, namely, oaths,[57] hostages,[58] pledges, guarantees—(a) consisting of offering persons as sureties, (b) choosing third powers as guarantors of the treaty,[59]—and military occupation of territory.[60]

The Pope frequently assumed the power of absolving a king from his treaty engagements.[61]

Notwithstanding the fraud and deceit which prevailed in international relations, there was a strong opinion[62] in favor of the

[57]Thus, it was customary to add to the solemnity of a treaty by taking an oath over the bones of the saints, the gospels, wood of the true cross, the Host, and the like; or the parties frequently submitted themselves to the jurisdiction and censure of the Church. They apparently were greatly concerned lest the Pope should absolve one of them from his oath. See Mountague Bernard, The Obligation of Treaties (1868), quoted in Manning, Int. L., 2 ed. Amos. (1875) p. 125, for examples of the language used in treaties to give them a binding effect.

The following treaties were confirmed by oath:

1526, Treaty of Madrid between Francis I. and the Emperor Charles V.
1529, Peace of Cambrai.
1559, Peace of Chateau Cambresis.
1559, Peace of the Pyrenees.
1648, Peace of Münster, between Spain and the revolting Dutch colonies.
1668, Peace of Aix-la-Chapelle between France and Spain.
1697, Peace of Ryswick.

Phillimore, Int. L., 3 ed. (1879-1888) p. 81. The last case of a treaty secured by oaths was that of the alliance between France and Switzerland in 1777. 1 Oppenheim, Int. L., 2 ed. (1912) p. 566; 1 Halleck, Int. L., 4 ed. (1908) p. 309.

[58]The last case of hostages was that of the Peace of Aix-la-Chapelle in 1748, by which hostages were stipulated to be sent by Great Britain to France for the purpose of securing the restitution of Cape Breton Island to France. Two hostages were sent and remained in France until July, 1749. See Hall Int. Law 6 ed. (1909) p. 339; 1 Oppenheim, Int. L., 2 ed. (1912) p. 566; Wheaton, Elements, Dana's ed. (1866) p. 365.

[59]2 Phillimore, Int. L., 3 ed. (1879-1888) p. 81.

[60]1871—Preliminary Peace Treaty of Versailles between France and Germany at the conclusion of the Franco-German War, provided that Germany should retain military occupation of certain parts of France until the final payment of the war indemnity which was imposed upon France. The German troops remained in possession until the amount due was paid. 1 Oppenheim, Int. L., 2 ed. (1912) p. 567; 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 83.

[61]In the following cases the Pope absolved the parties from the obligation of a treaty: Ferdinand, called "The Catholic", was released by Pope Julius II.; Francis I. by Leo II. and Clement VII.; Henry II. of France by the Papal Legate Caraffa. 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 82. 1 Halleck, Int. L., 4 ed. (1908) p. 310, contends, not without great force, that the conduct of the Pope is not to be judged by modern standards and conditions.

[62]1747—"Glory be to God * * * who, among other things has rooted out all hatred and enmity from the bosoms of these nations, and has com-

notion that treaties should be observed, and there were a number of shining examples of such observance which stand forth in the dark history of medieval Europe. In recent times, this opinion has grown stronger, and the principle of the obligation of treaties is now universally assented to by all states, although sometimes violated in practice,[63] and is supported by the unanimous opinion of the text writers.[64]

With the rise of democracy and the growth of constitutional limitations on the power of the king, the idea of the state, as being embodied in the person of the king, disappeared. A state is now regarded more nearly as a corporation, a public body, and at least is not regarded as the personal property of any individual or as representing the personal faith or honor of any individual. An oath, therefore, is entirely inappropriate in the execution of

---

manded them *to keep their Treaties inviolable,* as the ever glorious book sayeth, *O ye who believe, keep your covenants".* Preamble to Treaty between Nadir Shah, Emperor of Persia, and Sultan Mahmoud, Emperor of the Turks. Quoted in 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 70

1870—During the Franco-German war, Russia declared her withdrawal from such stipulations of the Treaty of Paris of 1856 as concerned the neutralization of the Black Sea and the restriction imposed upon Russia in regard to men-of-war in that sea. Great Britain protested, and a conference was held in London in 1871. Although by a treaty signed on March 13, 1871, this conference, consisting of the signatory powers of the Treaty of Paris, namely, Austria, Great Britain, France, Germany, Italy, Russia and Turkey, complied with the wishes of Russia and abolished the neutralization of the Black Sea, it adopted in a protocol of January 17, 1871, the following declaration: "It is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement." 1 Oppenheim, Int. L., 2 ed. (1912), pp. 575, 207, *n.* 1; 2 Phillimore, Int. L., 3 ed. (1879-1888) pp. 76, 77.

[63]1886—Russia notified her withdrawal from Article 59 of the Treaty of Berlin of 1878, stipulating the freedom of the port of Batoum, to which the other powers seemed to have consented, Great Britain protesting. 1 Oppenheim, Int. L., 2 ed. (1912), p. 575.

1908—October—Austria-Hungary, in violation of Art. 25 of the Treaty of Berlin of 1878, proclaimed her sovereignty over Bosnia and Herzegovina. 1 Oppenheim, Int. L., 2 ed. (1912) pp. 575-576.

1908—Bulgaria, in violation of Art. 1 of the Treaty of 1878, declared herself independent. 1 Oppenheim, Int. L., 2 ed. (1912) p. 575.

1914—Germany violated the provisions of the treaties guaranteeing the neutrality of Belgium and Luxemburg, to which she was a party, by making military use of the territories of these countries in the campaign against France, which opened the Great War of 1914.

[64]Manning, Int. L., 2 ed. Amos. (1875) p. 123, instances the multitude of subsisting treaties as a remarkable tribute to the practical force which is attributed to the good faith of states. Vattel, Chitty's Trans. (1861) Book II, § 163, says that the obligation of observing treaties is imposed by the natural law, and that the reproach of perfidy is esteemed by sovereigns a most atrocious affront. See 1 Phillimore, Int. L., 3 ed. (1879-1888) pp. 69, 70.

treaties between such bodies; even in a constitutional monarchy the personal aspect of the king has disappeared in the larger aspect of the state. The Holy See has ceased to absolve the obligation of treaties and the result in modern times is strongly in favor of the increased force of treaties.[65]

It is now important to consider in what respect treaties are binding. A contract is binding in municipal law because of (a) the attitude of the party who considers himself bound in honor, (b) the judicial remedy afforded by the political power of the state in case of a breach, (c) the fear of public condemnation visited because of failure to keep the contract, and the disastrous personal effect of the failure to perform one's undertakings, (d) pressure from the other party to the contract in the shape of reprisals and perhaps a refusal to have further dealings.

In other words, men are honest because of inborn instinct, because they are forced to be honest, or because it pays to be honest. The self-interest of an individual, therefore, which will frequently impel him to break a contract is restrained by the factors mentioned.

All these factors are present in international life except that of judicial remedy, and there is here the additional factor of force which is usually absent or negligible in individual affairs. A state, therefore, will be impelled to observe a treaty by (a) self-interest. This is usually present. Treaties are framed with more care than is usually exercised by the individuals in making contracts, and they commonly represent the best possible adjustment at the time of the conflicting self-interest of the parties. (b) International public opinion. The force of international public opinion impelling an observation of treaties is not to be despised or overlooked. Germany, in 1914, violated her treaty obligations with respect to the neutrality of Belgium, at first with insolent contempt. When, however, she felt the force of international public condemnation, she immediately began to invent excuses for the violation, asserting that France had violated the treaty first, and, therefore, she was excused in doing what she did. This public opinion is gaining strength every day with the increased diffusion of education among the masses. (c) Pressure from other states.[66] This

[65]It is to be understood that these remarks do not apply to the few autocracies, such as Germany and Austria-Hungary, etc., which still remain.

[66]Instances of treaties enforced by direct pressure of one contracting party against the other:

1840—Case of Sulphur Monopoly in the Kingdom of the Two Sicilys. By treaty concluded in 1816 between Great Britain and the Kingdom of the

pressure may be exercised by diplomatic suasion, threat of or the use of force, and may be applied by the other party or parties to the treaty or by third states not parties. The other state may also resort to reprisals, and thus enforce compliance.

There is also an element of necessity. It is necessary for independent states in their conduct with each other to be able to entertain a reasonable well-founded expectation that other states will observe their written obligations.[67]

A state is the only party to a treaty, and if the treaty has any

Two Sicilys, certain commercial advantages were secured to citizens of Great Britain, and the Neapolitan Government stipulated that no mercantile privileges disadvantageous to such interests should be granted to any other state. In 1847, the Kingdom of Naples granted a monopoly of all the sulphur worked and produced in Sicily to a company of private individuals, nationalists of different countries. In consequence of the refusal of the King of Sicily to rescind the grant of the monopoly, the English fleet commenced hostilities in the vicinity of Naples, whereupon the Neapolitan government gave way. 1 Halleck, Int. L., 4 ed. (1908) p. 115; 3 Phillimore, Int. L., 3 ed. (1879-1888) pp. 35-37.

1840—Great Britain and Portugal. Portugal compelled to sign a convention for payment of certain claims of British Legion and British auxiliary force in Portugal. The account is obscure. 1 Halleck, Int. L., 4 ed. (1908) p. 115.

The United States Congress, by resolution of July 7, 1798, declared that treaties with France were no longer obligatory on the United States, as they had been repeatedly violated by the French Government and all just claim for reparation refused. The French Government refused to admit the abrogation of the treaties. 1 Halleck, Int. L., 4 ed. (1908) p. 347; 5 Moore, Dig. of Int. L. (1906) p. 356.

Action of United States in enforcing treaty of July 4, 1831, for settlement of spoliation claims against France. See 7 Moore Dig. of Int. L. (1906) p. 123 *et seq.* Vattel, Chitty's Trans. (1861) Book II §§ 221, 222, advances the opinion that where a nation has violated a treaty, other nations are justified in forming a confederacy to punish the violating nation. This opinion has been criticised by subsequent writers, for example, Halleck, who says, 1 Halleck, Int. L., 4 ed. (1908) p. 308, that Vattel is not sustained by later authorities. The events of the Great War of 1914, however, where Germany brought down upon herself the coalition of nearly all the great powers of the world, largely because of her violation of the terms of a treaty, seem to lend great weight to Vattel's opinion.

[67]Oppenheim, Int. L., 2 ed. (1912) Vol. 1, pp. 542-543, advances the following views on the binding force of treaties. He says the question can be satisfactorily dealt with by only answering several questions, which he propounds and answers as follows:

(1) Why are treaties legally binding? To which he answers—that they are so because of a customary rule of the law of nations. The answer, however, begs the question, which is whether there is a rule of international law which makes them binding. Unless there is such a law, they cannot be binding, and even if such a law exists, there is the further question of the binding effect because of the impotency of that law, which, as we have seen, is in a condition of self-help.

(2) What is the cause of the existence of such a customary rule? To which he answers that the rule is required by religious and moral reasons, as well as the interest of states, that there can be no law between nations in the absence of such a rule, to which he adds: "All causes which have been and are still working to create and maintain an International Law are at the background of this question." The answer to the second question clearly shows that the learned professor is simply saying that there

obligation at all, it is obligatory only on the state in its corporate capacity. Individuals within the state are affected only by the municipal law imposing on them an obligation conforming to the superior obligation resting upon the state. This command of the municipal law may appear either in an act of the legislature or in a decree of the court. A failure of the state to make the municipal law conform to the obligation of the treaty is simply a failure to carry out the terms of the treaty. So also where the powers of the government are divided by a constitution into executive, judicial and legislative, and the treaty-making power is vested, as is generally the case, in whole or in part in the executive, the legislative branch may refuse to pass the necessary legislation to carry out the treaty.[68] Such a refusal may be grounded on some objection to the treaty or may proceed merely from jealousy.

---

are quite good reasons why treaties should be binding, which statement no one will deny. Which, however, is not the same thing as a statement that they are in fact binding by law. The statement that international law cannot exist unless treaties are binding simply begs the question, which is whether they are binding by international law. To say, furthermore, that certain causes are at the background of a question is hardly a statement of sufficient precision in a treatise on a subject of such scientific difficulty as international law.

(3) How is it possible to speak of a treaty as legally binding in the absence of judicial authority to enforce it? To which he answers that although there is a legal binding force to treaties, it is not the same as the binding force of contracts in municipal law, because international law is a weaker law than municipal law, and therefore less enforceable. But as international law does not lack legal character because of absence of judicial authority, so treaties have legally binding force even though there is no judicial authority to enforce them. Upon this it is to be observed that there is no question but that the absence of judicial redress in international law differentiates it from municipal law. To state that proposition, however, does not answer the question. When he says that international law does not lack legal character, he refers to § 5 of his book, which has already been discussed, and assumes that international law is law of some kind, but leaves entirely open the question whether he assumes it is law with a judicial right of redress, or law with only a right of self-help. If we grant his proposition, that international law is law in the sense that municipal law is, then it follows from the definition that treaties are legally binding. If, however, we disregard this assumption, the question remains open to further inquiry.

Martens (quoted in 1 Halleck, Int. L., 4 ed. (1908) p. 301) says the following elements are necessary to make a treaty binding: (1) that the parties have power to contract, (2) that they have consented, (3) that they have consented freely, (4) that their consent is mutual, (5) that the execution is possible. This, however, introduces too many conceptions of the municipal law, and does not cover the subject even from that point of view.

For a discussion of the binding effect of treaties, see Hall Int. Law, 6 ed. (1900) p. 318 *et seq.*; 2 Phillimore, Int. L., 3 ed. (1879-1888) pp. 69, 70.

[68] Thus, the provisions of the commercial treaty of Utrecht between France and Great Britain, by which the treaty between the two countries was to be placed on the footing of reciprocity, was never carried into effect, the British Parliament having rejected the bill brought in to change the municipal law. Wheaton, Elements, Dana's ed. (1866) p. 339.

EXCUSE FOR NON-PERFORMANCE.

There are two questions, as in municipal law, which, however, are not clearly distinguished by the international law writers. The first is—is the treaty binding? The second is, assuming that it is—are there any excuses for its violation which may be recognized?

Since there is no political power superior to the independent states of the world to pass on the validity of any excuse, the question can only be resolved by the operation of the forces impelling the observance of the treaties already referred to.

If the contract is binding in municipal law, that is, has been properly formed, then there is no escape from its obligation except by some legally recognized excuse. If it is not binding, then the question of excuse is not reached, but the party may set up a refusal to be bound at all because there never was any valid contract. The escape from the obligation of the contract must be considered from one point of view or the other, and both cannot be entertained at the same time, although the writers have frequently made the attempt.

It is to be observed, in the first place, that an executed treaty cannot be said to have any binding effect because it has been performed, and there is nothing left for either of the parties to do. There is no room, therefore, to impose any obligation under it. It has been supposed, however, that there is an obligation of some sort surviving the performance of the treaty.

Thus, if a treaty of cession is made and carried out, as, for instance, the treaty between the United States and Denmark, relative to the transfer of the Virgin Islands, the territory ceded becomes a part of the other state. In the case put, the Virgin Islands are now part of the territory of the United States of America. The notion in question, however, appears to go to the point of maintaining that Denmark is under a duty or obligation arising out of the treaty to refrain from interfering with the United States' exercise of jurisdiction over these islands. It is no more competent for Denmark to undertake to retake possession of those islands than it would be for Denmark to undertake such an act with respect to Massachusetts, Virginia or Texas. The United States must maintain the integrity of its territories by force, and if it is not able to do that, no principle of any kind can save it. Why, therefore, invent a fanciful conception of contract obligation

surviving the full performance of a treaty to account for conduct which can as well be explained by the facts of international life?[69]

It has often been said that a treaty is not binding which is in violation of international law or contrary to morals. This is a mere opinion of the writers. Since there is no tribunal in existence over the states to determine the question, we must assume that every obligation between two states is equal in all respects in validity to every other obligation. So, also, the statements in the books that immoral treaties are void, and that a treaty cannot provide for the doing of an act by a third party, are merely academic.[70]

Suppose a treaty is made by the officers of the state beyond the powers conferred upon them by the municipal constitution. This would present a case of an *ultra vires* treaty. Of course, when there is no such limitation by the municipal law, and the monarch exercises the sovereign power, there can be no question of an *ultra vires* act because his power is co-extensive with every act which he can perform.

It has been suggested that a treaty ruinous to a state or destroying the national organization is beyond the power of the head of the state, and that such a treaty would be illegal or null and void. What is meant is, that the people as a body would refuse to perform such a treaty and require the head of the state to go back on his word, and the question whether such action would be successful will be determined in the last analysis by force, that is, whether the state is powerful enough to maintain its position.[71]

---

[69]1 Oppenheim, Int. L., 2 ed. (1912) p. 570, says that the performance of a treaty does not terminate its binding force, and it is as valid as before, although now of historical interest only. It is difficult, however, to perceive what is the binding force of a treaty which neither party is obligated to perform. The learned professor probably has in mind the fact that the altered state of facts brought about by the performance of such a treaty continue in existence by virtue of such performance.

[70]Hall Int. Law 6 ed. (1909) p. 320, cites as examples—a treaty which has for its object the subjugation or partition of a country, or a treaty for the assertion of proprietary rights over the open ocean, or a compact for the re-establishment of the slave trade.

A treaty cannot obtain (a) engagements inconsistent with those already entered into with other states; (b) an engagement to do or to allow that which is contrary to morality and justice; (c) it may be invalid upon the ground of physical impossibility existing at the time or supervening from later circumstances. 2 Phillimore, Int. L., 3d ed. (1879-1888) pp. 78, 79.

Vattel, Chitty's Trans. (1861) Book II § 161, says that a treaty concluded for an unjust or dishonorable purpose is absolutely null and void for want of sufficient powers, nobody having a right to engage to do things contrary to the law of nature, and instances an oppressive alliance for the purpose of plundering a nation.

Hall Int. Law 6 ed. (1909) pp. 338, 339, says that third states are not bound to observe a treaty between other states contrary to law.

[71]After the return of Francis I. of France from captivity at the hands

A treaty may become burdensome to the best interests of the state, and it may turn out that the performance of its terms will be of serious damage to the interests of the people of the country. Is there any ground to escape the obligation of the treaty, assuming that such an obligation exists? There is, as we have seen, no power superior to the state to determine whether the performance of the treaty is in fact prejudicial, and every state will be guided by its own discretion and self-interest, subject to the external compulsions of international public opinion and pressure from other states. The practical question in each case will be—which is the stronger—self-interest or external compulsion? The Germans, in 1914, concluded that self-interest was stronger and violated the neutrality of Belgium in defiance of international public opinion and external pressure from other states.

It is useless to attempt the statement of rules applicable to such a case. The plain long and short of it is that every state will disregard a treaty which it considers ruinous whenever it feels strong enough to do so.[72]

It is generally stated by the writers that a change in circum-

---

of Emperor Charles V., some of the principal people of France declared that the treaty of Madrid, forced from Francis by Charles, was void as contrary to the laws which in express terms prohibited the king from dismembering the kingdom without the concurrence of the nation. Vattel, Chitty's Trans. (1861) Book I, § 265.

In 1506, the States General of France assembled at Tours, engaged Louis XII. to break the treaty which he had concluded with the Emperor Maximilian and the Archduke Philip (his son) because the treaty was pernicious to the kingdom. Vattel, Chitty's Trans. (1861) Book II, § 160.

Westlake, Int. L., 2 ed. (1910) Vol. 1, p. 295, under the heading "The Obsolescence of Treaties", appears to discuss certain cases where one of the parties may consider itself as no longer bound. Obsolete means gone out of use, and obsolescence means the going out of use. The query arises—how is it proper to speak of a treaty which is void or as to which there is an excuse for its non-performance, as going out of use? He discusses under this heading the case of a party refusing to be bound because of a change of circumstances.

[72]The opinion has been advanced that a state may disregard a ruinous treaty. Vattel, Chitty's Trans. (1861) Book II, §§ 157-160, says that a treaty is valid if properly entered into and may not be disregarded for mere injury; it is null and void when it would lead to the ruin of a nation because such a treaty is beyond the powers of the conductor of the state, since a state being under an obligation to preserve itself may not enter into engagements contrary to its indispensable obligations.

Manning, Int. L., 2 ed. Amos (1875) p. 73, says that an understanding actually exists among the powers of Europe to the effect that no delegate is supposed to have power to compromise a nation's vital prosperity, independence or permanent happiness, and that no nation is expected to fulfill a treaty at any enormous sacrifice to its happiness. He instances under the latter head a treaty of mutual succor, and says that one of the states would not be expected to detail forces to aid the other when subject itself to an invasion, the repelling of which would require all its resources. He instances the States General of France, that in 1506, at Tours, engaged

stances will sometimes justify a state in refusing further performance of a treaty or that every treaty is entered into under an implied condition that the circumstances existing at the time will continue, and that therefore a change in those circumstances will constitute a breach of the condition and effect a release from the obligation of the treaty. The first question is—what change in circumstances will have such an effect? Upon this there is no agreement. Vital, essential, are the terms used, or it is said that the party entitled to disregard the treaty is only to act under a grave sense of moral responsibility. Such looseness of thought is open to serious objection, and entirely removes the principle from any possible accurate practical application. The doctrine of implied condition is purely judge-made, evolved to promote the doing of justice in affording redress on a contract. It seems to have no place, therefore, in the political anarchy of the international world, and the doctrine is too refined for the rough jostling of independent states.

It is perfectly obvious that in international affairs cases will frequently arise where a change of circumstances will put an entirely different aspect on the obligation of a treaty and bring the self-interest of a state in direct opposition to further performance. Many of these cases will be so clear that all reasonable men will be in agreement. As to others, there will be a doubt which can only be adjusted by the action of the states concerned, in which action there is no external factor of restraint except those existing in the international world, to which we have already alluded.

Contracts between individuals rarely extend over any considerable period of time, and those exceeding the duration of a human life exist only in the case of leases, which refer to a permanent object, as property. Most independent states are several centuries old and some of them can look back on a thousand years of state life. It is obvious, therefore, that treaties entered into

Louis XII. to break the treaty he had concluded with the Emperor Maximilian.

Hall, Int. Law 6 ed. (1909) p. 342, says that the doctrines laid down by the writers are of such perilous looseness that under them an unscrupulous state need never be in want of a plausible excuse for repudiating an inconvenient obligation. This remark shows how far the writers are removed from the actual facts of life. It is a common saying at the bar that no contract can be written through which an astute and unscrupulous lawyer cannot drive a coach and four. If this is true, as it very largely is in municipal law, what can be said of the obligation of a treaty in international affairs where there is no political power to enforce it. The perilous looseness is not in the doctrine of the writers but in the structure of the international community.

between such bodies as these will, in the course of time, be more frequently complicated by a change in circumstances than will the contracts of shorter duration in time entered into by individuals.[73]

It has also been contended that a treaty is void when it is impossible of performance. In such a case the treaty will necessarily be broken because the party cannot perform. The case usually cited is that where three states contract a treaty of alliance, and two of them subsequently engage in war, the third state obviously cannot be an ally of both. Some writers would perhaps take the ground that in such a case there was an implied condition that none of the parties to the treaty would fight with each other; or it may be supposed that a treaty of alliance necessarily precludes the idea of hostilities between two of the parties, and therefore those two, by engaging in war, break the treaty and free the third state from any obligation of performance. Whatever view may be taken of this particular case, it seems clear that since there is no way of obtaining redress for failure to perform a treaty except by the external factors of compulsion on state conduct already alluded to, that in the case where a state finds it impossible to perform a treaty, there will ordinarily be no redress. Even in municipal law, the redress in such case would extend merely to compensation by way of damages and never to specific performance. Among independent states damages for breach of a treaty are almost unknown, and what each state requires, if it requires anything under a treaty, is full and specific performance by the other party.

In municipal law there are cases where the individual may

[73]Oppenheim, Int. L., 2 ed. (1912) Vol. 1, pp. 574, 575, says: "And the States and public opinion everywhere have come to the conviction that the clause *rebus sic stantibus* ought not to give the right to a State at once to liberate itself from the obligations of a treaty, but only the claim to be released from these obligations by the other parties to the treaty." * * * "For it is an almost universally recognized fact that vital changes of circumstances may be of such a kind as to justify a party in modifying an unnotifiable treaty * * * that all treaties are concluded under the tacit condition *rebus sic stantibus.*" pp. 572, 573.

Hall, Int. Law, 6 ed. (1909) p. 342, says: "Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory forces at the time of its conclusion is assentially altered." Westlake, Int. L., 2 ed. (1910) Vol. 1, p. 296, quoting this passage, seems to think it is not a clear principle, although so designated by Hall, and says that the question only arises when there is a difference as to what conditions were implied or were admitted; that the right of denouncing a treaty is an imperfect one, not to be condemned *in toto,* but only to be exercised on a grave sense of moral responsibility. For change in conditions, see 5 Moore, Dig. of Int. L. (1906) pp. 335-341.

obtain relief from the obligation of a contract which has been imposed upon him by duress. This relief is administered by the political power of the state acting through its appropriate agents. In the international world, there is no political power superior to the independent state, and therefore there is no judicial remedy for relief from the obligation of a treaty which has been imposed upon a state by force. Force rules the international world, and that which is accomplished by force and remains in continuance by force is the fact of that world. This is a matter of some difficulty as it is not easy at first for the student to perceive why the familiar principle which applies in municipal law does not apply to the relations of independent political communities.[74]

So also where one state violates a treaty another state may be prevented by the former from interposing successful opposition to the breach.[75] The partition of Poland was probably not so much a violation of a treaty, although some of the parties to the plunder may have broken special treaties, as it was a forcible destruction of the state by powerful neighbors.[76]

---

[74]Force also rules in municipal life to a greater extent than the closest philosophers are aware.

[75]Thus Belgium and Luxemburg, in 1914, were too weak to prevent Germany from forcibly violating her treaty obligations with respect to their respective neutrality.

[76]"In international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement. * * * Consent therefore is conceived to be freely given * * * so long as nothing more is exacted than it may be supposed that a state would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts." Hall Int. Law 6 ed. (1909) p. 319, quoted in Hershey, Int. L., (1912) p. 313. That is, the forced consent is a free consent if the amount exacted is no more than somebody supposes the state would freely give if it were willing, which obviously is an identical position and completely begs the question. "By means of a legal fiction, the sovereign defeated in war is also supposed to have freely consented to * * * (the terms) * * * imposed upon him by a treaty of peace." Hershey, Int. L., [1912] p. 101, *n.* 6. Why is there a legal fiction, and why confine it to defeat in war? A state may yield to overwhelming force without going to war.

Wheaton, Elements, Dana's ed. (1866) p. 340, says that generally a contract obtained by violence is void by municipal law, which principle promotes the welfare of society; otherwise the timid would be constantly forced into a surrender of their just rights. That, on the other hand, the welfare of society requires that engagements entered into by a nation under such duress as is implied by military defeat should be held binding, otherwise wars could only be terminated by the utter subjugation and ruin of the weaker party. It is submitted that this somewhat overlooks the true principle involved. Since in municipal affairs the political power of the state curbs violence between individuals, it necessarily follows that violence in obtaining a contract is to be curbed, and the only way to curb that is to permit the other party to escape the obligation upon proving the violence. In the case of international affairs, there is no political

There is a slight distinction to be drawn in this connection as a matter of historical interest. When the monarch was the state, it sometimes happened that he was the victim of duress, that is, the pressure was brought to bear upon him personally. Sometimes kings would be captured by their enemies, and while in captivity would be compelled to sign treaties. The opinion, therefore, was strongly entertained that duress of this kind was personal duress, and if the party who had been subject to it afterwards regained his freedom and was able to do so, he might disregard the treaty which had been wrung from him by compulsion.[77]

It has been said [78] that the surrender of the Spanish Crown

---

power superior to the independent states, and therefore no way to curb violence between them; consequently, a defeated state or one overcome by superior pressure cannot obtain any assistance and cannot thereafter, unless by its own force, escape from the fulfillment of the treaty which it was forced to make. Hence the treaty must be observed, not because of any principle of international law, but because of the stern facts of the case.

Oppenheim, Int. L., 2 ed. (1912) Vol. 1, p. 547, says. "A treaty concluded through intimidation exercised against the representatives of either party or concluded by intoxicated or insane representatives is not binding upon the parties so represented." But this assumes that a treaty not so concluded is binding, as to which there is a doubt. No case has arisen where a state has, after ratifying a treaty, set up the insanity or intoxication of any of its envoys as an excuse for non-performance. Cases have arisen where before ratification a state has refused to go on, on the ground that the terms were exacted from its envoy under such circumstances.

Oppenheim, *Ibid.,* says, "It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of the party consenting to the terms of a treaty." This is remote from the point involved. The action of the forced state is not voluntary, and no sophistry can make it so. The municipal law confers a remedy in such case upon the assumption that it was not voluntary. The absence of remedy in the international world is not to be placed upon the obvious fiction that the act is voluntary, from which it would follow that if it were involuntary there would be a remedy, which is not the case, but upon the obvious fact that although the act is involuntary, there is no remedy for the state forced.

[77]Instances of treaties made under compulsion by capture: 1111—Pope Paschal II. when prisoner by Emperor Henry V.; 1356—John of France, when prisoner of Edward III. of England at Poitiers; 1525—Francis I. of France at Pavia by Emperor Charles V. Woolsey, Int. L., 5 ed. (1878) p. 169. Pope Clement VII. refused to ratify a treaty he had made with the Duke of Ferrara while he was a prisoner. 1 Halleck, Int. L., 4 ed. (1908) p. 331.

Principal persons in France assembled at Cognac after the return of Francis I. from captivity at the hands of Emperor Charles V., declared that the treaty of Madrid which he had been forced to enter into by Charles, was void and that the latter ought not to have released his prisoner before the States General had approved. Vattel, Chitty's Trans. (1861) Book 1, § 265; 1 Halleck, Int. L., 4 ed. (1908) pp. 329, 331.

In 1811, the Cortez of Spain passed a decree that no engagement should be valid which might be made by Ferdinand during his captivity.

[78]2 Phillimore, Int. L., 3 ed (1879-1888) p. 76.

under compulsion of Napoleon by Charles IV. and his son, Ferdinand VII., at Bayonne, in 1807, is an instance of the application of duress, which invalidated the surrender and justified the subsequent disregard of it. The subsequent setting aside of the surrender of the crown was only possible because of the overthrow of Napoleon. It was not that the Spanish people were legally entitled to undo the transaction but that subsequent circumstances made it possible for them to do so. If Napoleon had returned from St. Helena and had been able to seize and maintain his former power, the action of the Spanish people would doubtless have been undone. There is no distinction, therefore, between the resignation of Napoleon at Fontainebleau and the surrender by Ferdinand VII. at Bayonne, except that in the first case the surrender has remained an accomplished fact in the international world, whereas, in the second case, the party surrendering was able in fact to reacquire the crown surrendered.

In the case of a republic or a limited monarchy, there can be no personal duress such as was applied to kings because the treaty can only be made by the constitutional authorities of the state, and it does not seem possible in any of these cases that such pressure could be applied outside the state jurisdiction. Of course, where the state was the property of the king, this jurisdiction resided wherever the king traveled. The only duress, therefore, which can be applied to the case of these modern governments is the case of overwhelming force, threatened or applied, as in the case of a defeat in war.

Where agents are sent to negotiate a treaty, they may be subject to some form of compulsion, and if that is discovered by the state which sent them before the treaty has been ratified there seems to be no reason in principle or justice why the ratification should not be refused, and such seems to be the general opinion.[79]

It has sometimes been said that treaties cannot be made contrary to those already in existence. This is an academic statement because of course the inconsistent treaty can be made; the question is as to the effect of the second treaty on the first.[80]

[79]The duress of agents invalidates a treaty. A state may, of course, hold itself justified by political necessity in shaking off such an obligation (treaty enforced), but this does not alter the fact that such action is a breach of law. 1 Oppenheim, Int. L., 2 ed. (1912) p. 547. Why justifiable if a breach of law?

[80]For inconsistent treaty policy of countries in which different conduct has been observed in dealing with different countries, see, Hall Int. Law, 6 ed. (1909) pp. 10, 11.

"A sovereign already bound by a treaty cannot enter into others con-

EFFECT OF WAR ON TREATIES.

The effect of war upon treaties between the belligerents will vary according to the nature of the treaty. When the treaty is executed on both sides, as a boundary treaty or cession, the war will obviously have no effect because it is *functus officio*. The war may result in a change of the facts resulting from the performance of the treaty, as a change in the boundary. In such case, however, it is not the treaty which is affected but the state of facts resulting from the performance of the treaty.

If the treaty is made purely for the event of hostilities, it may or may not be observed by the belligerent parties. This is entirely a matter in their discretion, and it frequently happens that warring powers will disregard treaties which they find are not to their advantage in carrying on the hostilities.

If the treaty calls for continuous or future performance on each side of some matter unconnected with the war, as a treaty of extradition, the performance of the treaty will obviously be interrupted and may or may not be renewed after the termination of hostilities. The question of such renewal will be entirely within the discretion of the warring parties. It may be provided for in the treaty of peace which concludes the hostilities, or it may not.

As the circumstances which give rise to the treaties will obviously recur at the termination of the war, the states will generally continue the performance unless there is some special reason to the contrary arising out of the war.

A war may, of course, be undertaken as a result of a particular treaty, where there is a refusal to perform it coupled with an insistence on its performance by the other side. When the war is over, the parties will, in the treaty they make, confirm old treaties or not, as they see fit, and obviously while the war is going on, each side will observe such treaties as it thinks necessary. The continuance of any treaty between the belligerents during the war is a mere matter of mutual consent, as is also the revival, abrogation or continuance of such a treaty after the war. Where, however, the

---

trary to the first. The things respecting which he has entered into, engagements, are no longer at his disposal." Vattel, Chitty's Trans. (1861) Book II, § 165.

Thus, the provision of the Declaration of Paris of 1856, abolishing privateering, *ipso facto* abrogated all provisions of existing treaties providing for privateering made between the parties to the declaration. 1 Oppenheim, Int. L., 2 ed. (1912) p. 578. See. however, *n.* 1 on same page. For instances see, 5 Moore, Dig. of Int. L. (1906) pp. 363 *et seq.* 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 126, discusses the subject under heading of collision of treaties.

belligerents are parties to a general treaty, to which other independent states are parties, then no two of them can, except by force, set the treaty aside or escape from its provisions by a controversy between themselves without the consent of the other parties.

It is believed that this is all there is to be said upon the subject. The writers have attempted to lay down a number of rules which seem rather academic and hardly applicable to the hard facts of life. Since there is no political power superior to the independent states to enforce a treaty in time of peace, it is obvious that in time of war, when external restraints on the action of states are of less effect, that treaties will be the less observed. No case has been found where a state has been compelled by any of the rules laid down to continue the obligation of a treaty after the war, and in all cases which have occurred, the treaties have been revived, if at all, by the consent of the parties. The notion was formerly entertained that if the war arose in breach of the provisions of the treaty, the latter was thereby annulled, but if the war arose from a cause independent of the treaty, the rights acquired by such treaty would still subsist.[81]

---

[81]Grotius, III. Ch. 20, §§ 27-28; Vattel, Chitty's Trans. (1861) Book IV. § 42. This view is now obsolete. Wheaton, Elements, Dana's ed. (1866) p. 353 n.

"Thus the Treaty of Peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the Supreme Court of the United States determined, that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be devested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions." Wheaton, Elements, Dana's ed. (1866) p. 341.

As to the effect of the War of 1812 on the third article of the Treaty of 1783 between Great Britain and the United States relating to Newfoundland fisheries, see, Wheaton, Elements, Dana's ed. (1866) pp. 342-350.

By the Treaty of Paris, which ended the Crimean War, it was stipulated that until the treaties or conventions existing before the war between the belligerent powers were removed or replaced by fresh agreements, trade should be carried on on a footing of regulations in force before the war, and the subjects of the belligerent states should be treated as between those states as favorably as those of the most favored nation.

1859—Treaty of Zurich. Austria and Sardinia confirmed all treaties in vigor upon the commencement of the war of that year. As between

EFFECT OF BIRTH AND EXTINCTION OF STATES.

Several questions arise in connection with changes in state personality. These cases are as follows: (a) new state arising by revolt, (b) one state being merged in another state and the effect on the treaties of the states so merged, (c) one state being merged as in (b) and effect on the treaties of the state into which merger takes place, (d) cession of state territory and the effect of on treaties between the contracting parties and third states, (e) change in government, as new dynasty, (f) breaking up of a state into component parts, as where a union is dissolved.

Austria and France no revival or confirmation of treaties was stipulated although agreements of every kind existed between them.

1866—Treaty of Vienna between Austria and Italy confirmed afresh the treaty of Zurich. The Treaty of Prague revived, or, in other words, restipulated all the treaties existing between Prussia and Austria so far as they had not lost their applicability through the dissolution of the Germanic Confederation.

1871—The Treaty of Frankfort revived treaties of commerce and navigation, a railway convention having reference to the customs, copyright, conventions and extradition treaties without mentioning any other treaties by which France and Germany were bound to each other.

1905—The Treaty of Portsmouth, which concluded the Russo-Japanese War, did not renew, confirm or revive a single treaty. Hall Int. Law 6 ed. (1909) pp. 380, 381.

1898—Spain, at the outbreak of the war with the United States of America, declared all treaties with the United States cancelled. See 5 Moore, Dig. of Int. L. (1906) p. 372; 2 Oppenheim, Int. L., 2 ed. (1912) p. 129, *n.* 5.

The Treaty of Peace of Frankfort (1871) between France and Germany, and of Portsmouth (1905), between Japan and Russia, placed the commercial relations of the former belligerents on the footing of the most favored nations class pending the negotiation of new conventions. Hershey, Int. L.. (1915) p. 361, *n.* 13.

It has been decided that Art 9, of the Treaty of November 19, 1794, between Great Britain and the United States, was not annulled by the breaking out of the war of 1812. 5 Moore, Dig. of Int. L. (1906) p. 372; 2 Oppenheim, Int. L., 2 ed. (1912) p. 130, *n.* 1; 2 Westlake, Int. L. 2 ed. (1913) p. 33.

A treaty calling for continuing performance may be suspended by war, but an honorable state will continue performance after the war. See example of Spain in continuing performance of Treaty of February 17, 1834, of Madrid, calling for the payment of an annual sum in settlement of certain claims of American citizens, after the war with United States in 1898. 5 Moore, Dig. of Int. L. (1906) pp. 376-380.

Westlake, Int. L. 2 ed. (1913) Vol. 2, p. 32, says that the general rule is that war abrogates the treaties existing between the belligerents, and their revival, if desired, must be expressly provided for in the treaty of peace except as to (1) Conventional obligations as to what is to be done during a war between the parties, (2) Transitory or dispositive treaties, (3) Treaties establishing arrangements to which third parties are parties, such as guarantees and postal and other unions. On page 33, he cites as examples of dispositive treaties not abrogated by war, the following:

(a) Clause in the treaty of 1795 between Great Britain and the United States, giving their respective subjects and citizens the right to hold and transmit land then held by them in the other country notwithstanding alienage.

Where a new state arises by revolt, it is obvious that no treaty made by the state from which it seceded can in any event be said to be binding on it as it was not a party thereto. No case has been found where any such contention has been made.

Where one state merges into another, the state merging disappears from international life, and the treaties which it has made with other states will be of no effect because the party obligated to perform has ceased to exist. Any performance, if they are to continue in effect, will have to be undertaken by the state into which the merger takes place. Ordinarily, the treaties of the latter will cover most of the matters regulated by the treaties of the disappeared state.

Where a state is merged into another, the treaties of the state into which the merger takes place may be affected, and such a merger may involve a violation of such a treaty. If so, it is the same as any other violation, as the merger was the result of the act of the state into which the merger takes place.

In nearly all these cases of merger, the treaty obligations have been taken care of by provisions of the parties at the time, and no case has been found where any state contended that a treaty which was not so provided for was binding under the new state of affairs.[82]

Where one state cedes part of its territory to another, the question has been raised as to the effect, if any, of such cessions upon the treaty obligations of the state ceded. By analogy to the municipal law, it seems clear that if the treaty relates solely to the territory ceded, as a treaty of boundary, or the performance of the treaty calls for the doing of an act on the ceded territory, then the state to which the property is ceded should assume the obligation of further performance, and also it seems clear that such cession

(b) Treaty of 1760 between France and Sardinia (now applying to Italy) relative to the execution in *either* country of judgments of the other country.

(c) Convention of June 12, 1902, and July 11, 1905, relating to certain parts of private international law.

The same author says, Vol. 2, p. 32, that the distinction between abrogation of treaties and suspension of treaties by war is merely a difference of statement, and that treaties of peace seldom fail to stipulate as to what is the intent as to old treaties; see 1 Halleck, Int. L., 4 ed. (1908) p. 314; 5 Moore Dig. of Int. L. (1906) pp. 372-389; 2 Westlake, Int. L., 2 ed. (1913) p. 32; in Vol. 1, p. 298, the same author says that the abrogation of treaties by war is preferable as a generalization to their suspension, because fewer instances will occur if abrogation is taken as the standard. See, Wheaton, Elements, Dana's ed. (1866) p. 352 and *n.* 143.

[82]A theory of state succession has been advanced which is material in this connection, but which is discussed at another place.

would have no effect upon the general treaties of the ceding state having no relation to the territory ceded. A case might arise where one treaty covered both cases, and it would be difficult to separate the various provisions. If the provisions were separable, the case is clear; if not, the matter would have to be adjusted by the consent of the contracting parties. While this question has been discussed at length by the writers, no case appears to have arisen in practice involving any such controversy. It seems that the habitual conduct of states has been such as to prevent any difficulties arising. It will probably rarely occur that any cession of territory will affect a treaty obligation.

Where there is a change in the government of the state, as the succession of a new king, or any other internal modification, there seems to be no reason why the obligation of the state should not continue. Changes in the municipal law have no effect upon the external aspect of the state. A difficult case occurs where a government is totally extinguished by anarchy, as, for instance, during the French Revolution, and a new government arises.[83]

Where a state breaks up into component parts, as where there is a dissolution of a union or a confederacy, or the state is forced out of international existence by other states, as in the case of Poland, there is a complete disappearance of one of the parties to the treaties which such state may have made, and nobody who could be called upon for performance is in existence. The treaties of such a state, therefore, may well be said to fall to the ground.

An analogous case arises in municipal law, where there is a purely personal contract, as for services, and the party agreeing to render the services dies. There does not seem to be any principle under which the new states appearing in such a case can be called on to fulfill the treaty obligations of the old parent state.[84]

[83]There has been a difference of opinion as to the effect of change of government on the obligation of treaties. For references to the views of some of the writers, see, 1 Westlake, Int. L., 2 ed. (1910) p. 67, *n.* 1.

[84]Many writers confuse with treaties unilateral obligations such as public loans, etc., and the question of succession to property or territorial rights, both of which, however, are clearly to be distinguished; *e. g.*—Hall Int. Law, 6 ed. (1909) p. 91.

Some writers are of opinion that there is a rule of international law binding states to the obligation of treaties upon succession. 1 Oppenheim, Int. L., 2 ed. (1912) pp. 127, 129, *n.* 2.

Wheaton, Elements, Dana's ed. (1866) p. 44, says that personal treaties relating to the persons of the contracting parties come to an end at the death of the king or the extinction of his family, but that real treaties, being those relating to subject matters of the convention independently of the contracting parties, continue to bind the state, whatever intervening changes may take place in its internal constitution or rulers, except where

The question whether a treaty binds third parties is doubtful, if there is a question as to whether the treaty binds the parties to it. Treaties have effect on third states and their citizens. The question arises whether a state may acquire rights under a treaty made between other states.[85]

Accession means (a) the formal entrance of a third state into

---

the treaty relates to the form of government itself, and is intended to prevent any such change in the internal constitution of a state.

Both Sweden and Norway have signified their desire that treaties concluded in common by the two countries during the union should be considered as remaining valid until formally disclaimed, Norway retaining no responsibility for Sweden, and *vice versa*.

1866—On the incorporation of the Kingdom of Hanover into Prussia, the Hanoverian treaties of amity, commerce, navigation, extradition and copyright ceased to exist. They were replaced by the Prussian treaties on the same subjects. 1 Rivier, 73, quoted in 1 Westlake, Int. L., 2 ed. (1910) p. 60.

When Texas was incorporated into the United States, England and France hesitated to admit that their commercial treaties with the latter had fallen to the ground. 1 Westlake, Int. L., 2 ed. (1910) p. 60.

On annexation of Madagascar by France, Great Britain and the United States admitted that they could no longer claim the benefit of the Malagasy tariffs which had been arranged by conventions between them. 1 Westlake, Int. L., 2 ed. (1910) pp. 60, 84.

1871—After the incorporation of Naples in the Kingdom of Italy, it was decided by the courts both in Italy and France that a treaty of 1760 between France and Sardinia, relative to the execution of judgments of the tribunals of the one power within the territory of the other, was applicable to the whole Italian State. Hall Int. Law, 6 ed. (1909) pp. 99 and 21, *n.* 1.

The separation of Belgium from the Kingdom of the Netherlands and the change wrought thereby in the relations of Holland with the great powers, were held by the United States to justify it in withdrawing from an agreement to accept the King of the Netherlands as an umpire on the northeastern boundary question. When Texas agreed to unite itself to the Republic of the United States, France and England notified her that she did not thereby cease to be bound by her treaty obligations with those powers. Wheaton, Elements, Dana's ed. (1866) p. 48, *n.* 17.

The annexation of the two Dutch Republics by the British Government in 1900 raised several questions as to the obligation of the absorbing state. Hall, Int. Law, 6 ed. (1909) p. 100, *n.* 1.

For provisions of the text of the Declaration of Japan as to Treaties of Korea upon merger of the latter state with Japan in 1910, see 1 Oppenheim, Int. L., 2 ed. (1912) p. 128, *n.* 1.

[85] Hall Int. Law 6 ed. (1909) p. 338, says that a treaty may affect third parties. If a state of things is thereby brought into existence which other countries are bound to respect, then so long as it is lawful or consistent with the safety of states not parties to it, other states must not prevent or hinder the contracting parties from carrying it out.

A treaty by an independent state affecting a state dependent upon it does not make such dependent state a party to the treaty. 1 Oppenheim, Int. L., 2 ed. (1912) p. 568 n. 1.

The Hay-Pauncefote Treaty between Great Britain and the United States in 1901, and the Hay-Varilla Treaty between the United States and Panama of 1903, provided that the Panama Canal shall be open to vessels of commerce and war of all nations, although Great Britain, the United States and Panama are the only parties.

1881—Boundary Treaty of Buenos Ayres, § 5, provides that the Strait

an existing treaty so that such state becomes a party to the treaty, with all the rights and duties arising therefrom, or (b) the entry of a state into a treaty between other states for the purpose of guarantee.[86]

"Adhesion is * * * such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations or with regard only to certain principles laid down in the treaty."[87]

INTERPRETATION OF TREATIES.

The interpretation of treaties is a matter of construction and a discussion of it will be omitted. There is a great deal of information to be gleaned from the various arbitrations which have taken place and from the writings of the authors as to what interpretations have been in fact placed upon clauses of particular treaties, and what rules, if any, are to be laid down as applicable to the subject. In the note we have referred to a few instances involving the question of construction of a treaty and then referred to the discussion of some of the authors on the subject.[88]

---

of Magellan shall be open to vessels of all nations although Argentine and Chile only are parties.

1856, March 30—Treaty of Paris annexed to the Peace Treaty of Paris of 1856, provides that Russia shall not fortify the Aland Islands, to which only Great Britain, France and Russia are parties, although the provision was made in the interest of Sweden.

1911—Great Britain contemplated entering into a treaty of general arbitration with the United States of America. She previously notified Japan of her intention on account of the existing treaty of alliance, and Japan consented to substitute for the old treaty a new treaty of alliance, article 4 of which provides that the allies shall never wage a war with a third power with whom one of the allies may have concluded a treaty of general arbitration. 1 Oppenheim, Int. L., 2 ed. (1912) pp. 564-565.

[86] 1 Oppenheim, Int. L., 2 ed. (1912) pp. 568, 569.

[87] 1 Oppenheim, Int. L., 2 ed. (1912) p. 569.

[88] Hall Int. Law 6 ed. (1909) p. 327. Westlake, Int. L., 2 ed. (1910) Vol. 1, p. 392, *n.* 1, says that Hall is copious on the subject and that his discussion of it and the cases to which he refers afford much matter for reflection.

Hershey, Int. L., (1912) p. 315 *et seq.*; 1 Halleck, Int. L., 4 ed. (1908) pp. 317-327; 5 Moore, Dig. of Int. L. (1906) pp. 249-256; 1 Oppenheim, Int. L., 2 ed. (1912) p. 610; 2 Phillimore, Int. L., 3 ed. (1879-1888) p. 94; Wheaton, Elements, Dana's ed. (1866) p. 365; Woolsey, Int. L., 5 ed. (1878) p. 180.

Westlake, Int. L., 2 ed. (1910) Vol. 1, pp. 293, 294, thinks that the various rules suggested by the writers are not likely to be of much practical use, and he very cogently points out that rules of interpretation borrowed from the English common law, and applied to the minute drafting of English documents, are not properly applicable to treaties where such minute provisions are generally impracticable, and that in these cases a very liberal rule of interpretation should be adopted.

As to meaning of "most favored nation" clause, see 5 Moore, Dig. of Int. L. (1906) pp. 257-319.

EFFECT ON INDEPENDENCE.

A state may by treaty limit itself to certain acts, and there is no more ground to say that a nation thereby impairs its independence than to say that an individual by binding himself to do a certain thing loses his independence, although in each case there is, to that extent, a restriction on freedom of action.

Contracts may, however, be of such a nature as to extinguish personal independence, and the same is true of a treaty. The question is, when does the binding effect of the promise cover the entire activity of the individual or state or so interfere with it as to prevent any freedom of action whatever. A treaty may result in the merger of one state with another or its complete extinguishment; in the same way a state may also terminate its independence by treaty.

DO TREATIES MAKE LAW?

A treaty, as a contract between the parties, does not affect a third state. A great number of treaties between different states on the same matter might indicate a prevailing necessity of that particular rule of conduct or an opinion that it should prevail. On the other hand, the circumstance that the parties thought it necessary to make an agreement indicates that without the agreement there would be no compulsion to act. In the municipal law no court would reason that a rule of law existed from a large number of contracts having been made and then impose the rule on an individual who has not made such a contract.[89]

ROLAND R. FOULKE.

PHILADELPHIA, PA.

[89]Manning, Int. L., 2 ed. Amos (1875) p. 87, takes the correct view that they show that the practice provided for cannot be claimed except under the stipulation of the treaties.